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CATHOLIC TEACHING AND THE LAW CONCERNING THE NEW REPRODUCTIVE TECHNOLOGIES

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Abstract

This Article sets forth the fundamental teachings from which the Roman Catholic Church derives its positions on New Reproductive Technologies (NRTs). It further demonstrates the application of these teachings to some of the specific medical techniques commonly used in the course of NRTs. The Church's legislative recommendations are then summarized.

KEYWORDS: bioethics, ethics, medicine, new reproductive technologies, assisted reproductive technologies, Catholic, religion

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INTRODUCTION

The Roman Catholic Church has had much to say on the vast topic of New Reproductive Technologies (“NRTs”). According to some leading voices in the field, the Church’s teachings lie outside the pace of development and acceptance of many of the new technological means for satisfying couples’ and individuals’ desires for children. Still, the Church is able to command attention for various reasons. In part, it is because of its visibility and global size, but it is also because some of the Church’s ideas have secular counterparts; many observers have expressed concerns that mirror some of those proposed by the Church, even those writing from no particular religious viewpoint.

This Article will set forth the fundamental teachings from which the Roman Catholic Church derives its positions on the NRTs. It will further demonstrate the application of these teachings to some of the specific medical techniques commonly used in the course of NRTs. The Church’s legislative recommendations will then be summarized. For the most part, these recommendations have not found their way into law or practice. Still, it will be explained that many of the Church’s most deeply-rooted concerns about both the processes and effects of NRTs are echoed by legal scholars and others who ground these concerns not in Catholic, but in “human” terms. At the same time, these secular voices often come to different conclusions than those reached by the Church. This Article will explain how these diverging views develop from fundamental differences in starting points. They flow also from perceptions about the Church’s “agenda” in proposing legislation concerning NRTs.

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I. ROMAN CATHOLIC CHURCH TEACHING ON MATTERS PERTAINING TO NRTs

A. The Nature of the Human Person

In a general sense, Catholic teaching about NRTs is an excellent example of Catholic moral reasoning. Such reasoning often begins with an *is* and proceeds to one or more *oughts*.¹ In the case of NRTs, the Church begins by exploring the implications of the *is* of the human person, and the *is* of the nature of human sexual intercourse, to reveal the *oughts* regarding proposed methods of human procreation. The Church has established a baseline to enable us begin this analysis:

The fundamental values connected with the techniques of artificial human procreation are two: the life of the human being called into existence and the specific nature of the transmission of human life in marriage. The moral judgment on such methods of artificial procreation must therefore be formulated in reference to these values.²

The Church has repeatedly defended its expertise in defining the nature of the human person. Perhaps the most well-known occasion was during the speech of Pope Paul VI to the United Nations in 1965, wherein he called the Church an "expert in humanity," at the service of life and love.³ The Church has disavowed any intention to speak scientifically, but rather, "having taken account of the data of research and technology" it puts forward the "moral teaching corresponding to the dignity of the person and to his or her integral vocation."⁴ The criteria for moral judgment concerning the dignity of the human person are threefold: 1) respect for the human person; 2) the human being's "primary and fundamental right to life"; and 3) the transcendent aspects of the human person including a human soul and humanity's destiny in communion with God.⁵ A deeper look at these starting points reveals important implications for some of the technological imperatives of NRTs as they are practiced today.

1. PHILIP S. KEANE, *SEXUAL MORALITY: A CATHOLIC PERSPECTIVE* 43-46 (1977).

2. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY (DONUM VITAE)* 9-10 (1987) [hereinafter *DONUM VITAE*].

3. Paul VI, *Discourse to the General Assembly of the United Nations Organization*, in *57 ACTUS APOSTOLICUS SEDIS* 878 (1965).

4. *DONUM VITAE*, *supra* note 2, at 6.

5. *Id.* at 1-2.

The Church teaches that one ought to respect the human person because she has been created by God, and made in the very image and likeness of God.⁶ Furthermore, humans are made by God not out of need, but out of love. We are the only creature on Earth whom God has “wished for himself,”⁷ and this places us in a special relationship with God. Furthermore, God is our “sole end,” and the “lord of [our] life.”⁸ Human identity was elevated further when Jesus came to Earth and took on our humanity, including our human form, in order to win our salvation.

Physical life is neither the whole of a person’s value, nor the person’s supreme good, but in a certain way it is the fundamental value precisely because upon it all other values are based. This is not to devalue the human body. To do so would commit a dualist error of valuing the human soul, but not the body. This is a common error, made initially to elevate the non-physical goods of the person, but misused to degrade the physical body, as if when one touches the physical one does not reach the soul. As against this tendency, the Church emphasizes that the human body is a fundamental condition for human life, and for human destiny, eternal communion with God.⁹ The body is a “constitutive part of the person who manifests and expresses himself through it.”¹⁰ Accordingly, the body always merits physical respect.

During Jesus’ brief life on Earth, one of the ways in which he manifested the presence of God’s “kingdom” was by healing physical ailments.¹¹ It is quite characteristic of Catholic moral reasoning to consider problems presented in light of the effects upon the human persons’ integrated, body-soul nature. In the apt words of two Catholic theologians: “It is this recognition of a basic consistency in human moral experience – not only as free and rational but also as embodied and affective – that above all else characterizes the natural-law tradition.”¹²

Moving from the essential nature of the human person to the question of developmental stages in human life, the Church

6. *Genesis* 1:27 (New American); *DONUM VITAE*, *supra* note 2, at 10.

7. Paul VI, *Pastoral Constitution on the Church in the Modern World (Gaudium et spes)*, in VATICAN COUNCIL II, THE CONCILIAR AND POST CONCILIAR DOCUMENTS 925 (1977) [hereinafter *Gaudium et spes*].

8. *DONUM VITAE*, *supra* note 2, at 11.

9. JOHN PAUL II, THE GOSPEL OF LIFE, *EVANGELIUM VITAE* 38 (1995) [hereinafter *EVANGELIUM VITAE*].

10. *DONUM VITAE*, *supra* note 2, at 8.

11. *EVANGELIUM VITAE*, *supra* note 9, at 82-83.

12. THOMAS A. SHANNON & LISA SOWLE CAHILL, *RELIGION AND ARTIFICIAL REPRODUCTION* 137 (1988).

teaches that human beings merit respect from the moment of conception, because we are human from conception:

From the time that the ovum is fertilized, a life is begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth. It would never be made human if it were not human already.

....

To this perpetual evidence—perfectly independent of the discussions on the moment of animation — modern genetic science brings valuable confirmation. It has demonstrated that, from the first instant, there is established the program of what this living being will be: a man, this individual man with his characteristic aspects already well determined. Right from fertilization is begun the adventure of a human life, and each of its capacities requires time – a rather lengthy time – to find its place and to be in a position to act.¹³

The Church has not definitively spoken on when the soul comes into being. It concludes that the biological data alone does not prove the existence of a soul, but, offers a “valuable indication for discerning by the use of reason a personal presence at the moment of this first appearance of a human life: how could a human individual not be a human person?”¹⁴

Several *oughts* flow from these statements about the dual nature of the human person. As interventions on the human body affect not only the physical body, but the whole person,¹⁵ one may certainly intervene to assist when a person is ill. This supports the integral good of human life. This proposition is true with particular resonance in the fields of sexuality and procreation, “in which man and woman actualize the fundamental values of love and life.”¹⁶ However, there are limits to such intervention: “The life of every human being must be recognized and safeguarded from the moment of conception.”¹⁷ The Church insists that all life sciences must respect this fundamental right, including any intervention with the human embryo not directed towards its healing, the improvement of its condition of health or its individual survival.¹⁸

13. SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON PROCURED ABORTION 13 (1974) (citation omitted).

14. DONUM VITAE, *supra* note 2, at 13.

15. *Id.* at 8-9.

16. *Id.* at 9.

17. Secretariat of State, International Norms in the Area of Bioethics 4 (Sept. 26, 1994) (unpublished monograph, on file with author).

18. DONUM VITAE, *supra* note 2, at 9.

One final trait of the human person which the Church analyzes in order to reflect on NRTs is the intrinsically relational nature of each person. There are two aspects to this nature. The first aspect involves the call to act as stewards of our lives, not masters. The second aspect is the identification of service as the primary human vocation.

On the stewardship aspect, the Church opines that life is a “gift,” entrusted to each person, and that each person has a fundamental obligation to take responsibility for it. “[T]his fundamental principle must be placed at the center of one’s reflection in order to clarify and solve the moral problems raised by artificial interventions on life as it originates and on the processes of procreation.”¹⁹ In other words, humans are stewards of the lives that are gifted to them. Our responsibility is the care of human life; there is no right to demand the gift of life.

The second aspect of relational identity traces back to one of the earliest biblical pronouncements from God to Adam: “It is not good for the man to be alone. I will make a suitable partner for him.”²⁰ It is not merely that we are to keep company with others. Rather, as Pope John Paul II declares, the very meaning of life consists in the placing of one’s life at the service of God and others: “In this way, Jesus proclaims that life finds its centre, its meaning and its fulfillment when it is given up We too are called to give our lives for our brothers and sisters, and thus to realize the fullness of truth the meaning and destiny of our existence.”²¹

B. The Nature of Marriage, Sexual Relations, and Procreation

There is a close relationship in Roman Catholic teaching between who the human person has been created to be, and how he or she is to engage in human sexual intercourse, so as to share in God’s creative work of procreation.²² The transmission of human life has “a special character of its own, which derives from the special nature of the human person.”²³

There are additional truths that flow from the very nature of sexual intercourse and procreation. These truths derive primarily from the Church’s observation that the transmission of human life

19. *Id.* at 5.

20. *Genesis* 2:18 (New American).

21. *EVANGELIUM VITAE*, *supra* note 9, at 91 (emphasis omitted).

22. COMM. FOR PRO-LIFE ACTIVITIES, THE NAT’L CONFERENCE OF CATHOLIC BISHOPS, *HUMAN SEXUALITY FROM GOD’S PERSPECTIVE: HUMANAE VITAE 25 YEARS LATER* (1993) [hereinafter *GOD’S PERSPECTIVE*].

23. *DONUM VITAE*, *supra* note 2, at 10.

has been entrusted to a "personal and conscious act." Therefore, what may be permissible for plants and animals, may not be acceptable for humans.²⁴

According to the Church, human sexual intercourse has both a unitive and procreative dimension. The unitive dimension is reflected in the fact that couples are bound together in greater love, as a consequence of intercourse. The procreative dimension exists in its potential to conceive new life.²⁵

The procreative element of human sexual intercourse bears a particular transcendent aspect, as the act of procreation is deemed a sharing in God's "creative generativity."²⁶ It is a sharing "in a special way in his mystery of personal communion and in his work as Creator and Father."²⁷ The Church contrasts this view of human sexuality with the purely secular view that sexual activity is an instinct or need, which tends often to correspond with preeminent concerns that the body be free from disease or unwanted pregnancy.²⁸ The secular perspective also tends to correspond with the view that sex can be used to obtain a baby, separate from its intrinsically unitive dimension, a coming together which includes an "openness to the richness of life which the child represents."²⁹

Because human persons are a unity of body and soul, human marriage, including married love, should reflect this unity. Therefore, sexual intercourse should produce marital unity, and remain open to procreation. Catholic teaching holds that marriage between a man and woman is intended to reflect the love of God for all those persons He has created.³⁰ Marriage is intended to reflect this love not only to the children of the marriage, but also to the world. Put differently, marriage is intended to reflect the possibility for permanent, unconditional love; it is to be a glimpse of the love that God has for human persons, a love that is total, permanent, and unlimited.³¹ There should be a true communion of love

24. *Id.*

25. PAUL VI, *HUMANAE VITAE* (1968), reprinted in *HUMANAE VITAE AND THE BISHOPS* 33, 39 (John Horgan ed., 1972) [hereinafter *HUMANAE VITAE*].

26. *GOD'S PERSPECTIVE*, *supra* note 22.

27. *DONUM VITAE*, *supra* note 2, at 9 (citation omitted).

28. See *GOD'S PERSPECTIVE*, *supra* note 22.

29. *EVANGELIUM VITAE*, *supra* note 9, at 42.

30. Husbands, love your wives, even as Christ loved the church . . . For no one hates his own flesh but rather nourishes and cherishes it, even as Christ does the church, because we are members of his body . . . This is a great mystery, but I speak in reference to Christ and the church.

Ephesians 5:25, 29, 32 (New American).

31. See *GOD'S PERSPECTIVE*, *supra* note 22.

within a marriage, with each spouse completely open to the other in mutual self giving. Within this context, sexual intercourse is never merely about need, instinct, physical realities, or pleasure. Rather, sexual intercourse is a communion of “the innermost being of the human person . . . [A] part of the love by which a man and a woman commit themselves totally to one another until death.”³² A married sexual relationship is always about relation, and the human need to form a communion of persons. Sexual intercourse exclusively in marriage “makes sense,”³³ for by its very nature and structure, the couple is bound into a meaningful relationship that moves out into the future; this is captured within its unitive and procreative aspects together.

The Church recognizes married couples’ “profound desire to share their life and love by cooperating with God in creating new life and building a family.”³⁴ It further recognizes that “children are the supreme gift of marriage and greatly contribute to the good of the parents themselves.”³⁵ However, children cannot be simply “obtained”; human sexuality, and the human persons’ dignity should not be sacrificed to obtain a child. No one has a right to another person; this would be contrary to a person’s dignity and nature. We are gifts to one another, not obligations.³⁶

Derived both from this teaching about human sexual intercourse, and the teachings about human persons’ dignity, is the teaching that humans have the right to be conceived in a manner fit for human persons. Specifically, we have the right to be the fruits of the act of our parents’ sexual intercourse.³⁷ Pope John Paul II calls this the child’s right to have a fully human origin. It is fully human when it conforms with the human being’s personal nature. A personal nature reflected in a conception in love that is permanent, mutual, and totally self-giving, in a covenant reflecting the same kind of love God has for the human person: “Life is a gift that must be bestowed in a manner worthy both of the subject receiving it and of the subjects transmitting it.”³⁸

32. JOHN PAUL II, APOSTOLIC EXHORTATION ON THE FAMILY (FAMILIARIS CONSORTIO) 9 (1981) [hereinafter FAMILIARIS CONSORTIO].

33. Telephone interview with Theresa Notare, Director, Diocesan Development Program, United States Conference of Catholic Bishops (Dec. 1, 2001). Ms. Notare oversees the development of materials for Catholic dioceses on Natural Family Planning and Chastity.

34. See GOD’S PERSPECTIVE, *supra* note 22.

35. *Gaudium et spes*, *supra* note 7, at 953.

36. DONUM VITAE, *supra* note 2, at 32-34.

37. *Id.* at 31.

38. *Id.* at 19.

C. Particular Judgments of NRTs

Having looked at the Church's teachings regarding the nature of the human person and human sexual relationships, it is possible to evaluate specific aspects of NRTs in light of Church doctrine. One ought to begin by noting that the Church does not reject particular procedures on the grounds that they are artificial. Rather, the Church first morally evaluates them according to the "dignity of the human person."³⁹ Second, the value and meaning of coming together in marriage determine from the moral point of view the meaning and limits of artificial interventions to conceive new human life. Interfering with the nature of the marital sexual union can damage both individual persons as well as their relationships.⁴⁰ Artificial means which do not serve the human person, human marriage, or family life, but rather place technology over persons are problematic. In other words, technology should not be evaluated from the standpoint of its own results, efficiency, or ability to gratify long and deeply held wishes, if the technology acts at the expense of others. Rather, technology must serve human values, ordering itself to the nature of the human person, and the truth of human sexual intercourse.⁴¹

The Church supports interventions that address infertility itself. Despite a popular perception that NRTs address infertility, most procedures aim to "leap over" or "circumvent" infertility problems by finding a substitute for that which a particular human body is lacking.⁴² This regularly includes substitutes for a man's sperm and/or a woman's egg, via gamete or embryo donation,⁴³ for natural fertilization via in vitro fertilization, or intra-cytoplasmic sperm injection (the injection of male sperm directly into a female egg), or even for the womb of the mother who intends to rear the child via surrogacy.

39. *Id.* at 9.

40. See *HUMANAE VITAE*, *supra* note 25, at 39-40.

41. *DONUM VITAE*, *supra* note 2, at 7.

42. OLIVER O'DONOVAN, *BEGOTTEN OR MADE?* 32 (1984). At the time of writing *Begotten or Made?*, O'Donovan was a member of the Church of England's Board for Social Responsibility.

43. The eggs or sperm of the persons who are not the intended parent are regularly referred to as "donor gametes." However, they are regularly purchased by recipients for prices ranging from as low as \$50.00 to as high as \$50,000.00. See LORI B. ANDREWS, *THE CLONE AGE* 92-102 (1999); *Future Shock* (ABC World News television broadcast Aug. 22, 1999).

1. *Procedures on the Human Embryo*

Procedures aimed at healing and improving the embryo's health are approved by the Church, as they are consonant with the dignity of human life.⁴⁴ However, many procedures employed in the course of the NRTs either place the embryo at great risk or involve its deliberate destruction. In fact, various techniques involving the human embryo were performed for years prior to being attempted on chimps.⁴⁵

The Church condemns non-therapeutic operations on human embryos. Instead, it urges a "moral certainty of not causing harm to the life or integrity of the unborn child and the mother."⁴⁶ The Church also calls for the informed consent of both parents before such procedures can occur.

Some NRTs entail the deliberate destruction of human embryos or fetuses. The destruction of human embryos occurs in procedures where embryos are pre-selected for a particular sex, such as when parents attempt to avoid bearing a child with an inherited, sex-specific disease, or during or after preimplantation genetic diagnosis.⁴⁷ Human fetuses may be destroyed when a large number of embryos have been implanted in a woman's womb, and more than one begins to develop. When this occurs, doctors will often recommend that a certain number of the developing lives be aborted or "selectively reduced."

In addition to the deliberate destruction of embryos, many NRTs suffer from a high failure rate, leading to the demise of thousands of embryos and fetuses in labs across the United States. In the words of John Paul II:

Apart from the fact that they are morally unacceptable since they separate procreation from the fully human context of the conjugal act, these techniques have a high rate of failure: not just failure in relation to fertilization, but with regard to the subsequent development of the embryo, which is exposed to the risk of death, generally within a very short space of time.⁴⁸

One technique commonly employed is cryopreservation, the "freezing" of embryos not needed for immediate use. Despite the

44. DONUM VITAE, *supra* note 2, at 14-15.

45. ANDREWS, *supra* note 43, at 15.

46. DONUM VITAE, *supra* note 2, at 16.

47. Moshe Zilberstein & Machele M. Seibel, *Preimplantation Genetics and Preimplantation Diagnosis*, in INFERTILITY: A COMPREHENSIVE TEXT 761-72 (2d ed. 1997) [hereinafter INFERTILITY].

48. EVANGELIUM VITAE, *supra* note 9, at 25 (citation omitted).

frequency with which both scientific experts and laypersons refer to “frozen embryos,” it is by no means certain that any particular percentage of frozen embryos will survive either the freezing or thawing processes.⁴⁹

The Church holds that even the “noble” ends for which these technologies may be employed cannot justify this kind of destructive experimentation on human life.⁵⁰ On the contrary, a special duty is owed to human life which “finds itself most vulnerable when it enters the world and when it leaves the realm of time to embark upon eternity.”⁵¹

2. *Fertilization Outside the Human Body*

A number of NRTs such as in vitro fertilization, intra-cytoplasmic sperm injection, and zygote intrafallopian transfer, in which an embryo fertilized outside of the human body is reinserted in the woman’s fallopian tubes,⁵² involve penetration of the egg by the sperm outside of the human body. In the Church’s judgment, when fertilization occurs outside the body, the procreative aspect of human sexuality has been wrongly severed from its unitive aspect, the spiritual and physical union of the parents. Procreation is thus deprived of the meanings that come from its bodily source, and from the message that a man and a woman communicate to one another when they engage in human sexual intercourse. This form of procreation is instead dominated by the rubric and standards of scientific technology: efficiency and domination over nature.⁵³ It is not the result of a communion of persons in love. The child is deprived of being the result of procreation from a “fully human” communion, which involves a meeting both “of the sense and of the spirit.”⁵⁴ Love is absent at the moment of this type of fertilization; accordingly, it is not a method of procreation fit for the dignity of the human person.

It may happen that a couple seeks to use technological means to accomplish conception with their own sperm and egg, with the act of fertilization taking place either outside or inside the body of the

49. Patrick Quinn et al., *Cryopreservation and Infertility*, in *INFERTILITY*, *supra* note 47, at 799.

50. *DONUM VITAE*, *supra* note 2, at 16-17.

51. *EVANGELIUM VITAE*, *supra* note 9, at 77.

52. See generally THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY* 62-63 (1998).

53. *DONUM VITAE*, *supra* note 2, at 26-28.

54. *HUMANAE VITAE*, *supra* note 25, at 37.

woman. This is possible using methods of homologous artificial insemination. The Church disapproves of this practice, as it separates the unitive and procreative goods of sexual intercourse.⁵⁵ However, theological debate continues as to whether a technique known as gamete intrafallopian transfer (whereby gametes are inserted in a location within the woman's fallopian tubes where fertilization may take place),⁵⁶ can be employed to satisfy the Church's criteria that, "If the technical means facilitates the conjugal act or helps it to reach its natural objectives, it can be morally acceptable."⁵⁷

3. *Extra-Marital and Non-Marital Conceptions*

There are a number of ways in which conception by means of NRTs takes place outside of marriage, such as when a spouse obtains an egg, sperm, embryo, or surrogate mother. This also occurs when an unmarried person becomes a parent by means of a sperm or egg bank, or even an embryo adoption agency or fertility clinic selling "spare" embryos. Finally, posthumous conception employing the sperm of a deceased male can also produce conception outside of marriage. In these situations, the potential relationship between the child and one or both biological parents is intentionally severed, either contractually or by operation of law.

The Church recognizes every child's right to be conceived and gestated to birth within circumstances reflecting his or her human dignity, such as within an ongoing marriage. This dignity requires that the child be the fruit of a love that is permanent, mutual, and completely self-giving,⁵⁸ and within a covenant reflecting the same kind of love God has for the child. Thus, the Church condemns all heterologous artificial fertilization (usually known as artificial insemination by means of donor sperm), as well as the process of bringing together the gametes of other than two spouses. The Church's view is that an essential aspect of the marital bond is marital fidelity, wherein the spouses' observe "reciprocal respect of their right to become a father and a mother only through each other."⁵⁹ Conceptions outside marriage do not reflect this relationship.

55. DONUM VITAE, *supra* note 2, at 31-32.

56. SHANNON & SOWLE CAHILL, *supra* note 12, at 6-7.

57. *Id.* at 64.

58. DONUM VITAE, *supra* note 2, at 23 (citing *Gaudium et spes*, *supra* note 7, at 953).

59. *Id.*

The Church has opined that it is only “through the secure and recognized relationship to his own parents that the child can discover his own identity and achieve his own proper human development.”⁶⁰ The absence of such a relationship can hinder the “maturing of [the child’s] personal identity.”⁶¹ On a social level, the Church notes that “the good of the children and of the parents contributes to the good of civil society; the vitality and stability of society require that children come into the world within a family and that the family be firmly based on marriage.”⁶² Damage to personal relationships in the family threatens the unity and stability of the family, causing societal disorder and dissension.⁶³

The scientific community also contemplates several methods of creating human life which, in the eyes of the Church, lack both the unitive and procreative dimensions of human sexuality. These include methods such as cloning, parthenogenesis (creating a human person from the gamete of one sex), and twin fission (dividing one human embryo into two). The Church judges these methods as violating the integrity of human procreation and marriage.⁶⁴

D. The Church’s Legislative Recommendations

The Church understands that not all moral objectives can be realized by means of law. Put differently, it is impossible for civil law to take the place of personal conscience. The Church further acknowledges that certain moral problems must be tolerated because they cannot be forbidden without a resulting greater evil.⁶⁵ At the same time, the Church suggests that there are matters which must be regulated by law, because they pose direct threats to human life and social order.

The Church readily concludes that NRTs can affect constitutive elements of civil society and order, touch upon fundamental values about the right to life of innocent persons, and affect the family and marital life. From the Church’s perspective, NRTs affect “inalienable rights of the person,” rights given to persons not by the state, but by virtue of being human beings, including the right of a child to be conceived in a manner befitting her dignity.⁶⁶ It is the Church’s view that NRTs expose human beings to grave violations

60. *Id.*

61. *Id.* at 24.

62. *Id.* at 23.

63. *Id.* at 24-25.

64. *Id.* at 19.

65. *EVANGELIUM VITAE*, *supra* note 9, at 129.

66. *DONUM VITAE*, *supra* note 2, at 36.

of their human rights. The Church notes that it is quite unlikely that researchers in the field will regulate their conduct in order to sufficiently ensure the respect of personal rights and public order; as a result, lawmaking by the state is required to protect these rights.⁶⁷ This view is shared by some observers who would leave the fundamental practices of NRTs legally untouched.⁶⁸

Nevertheless, while the Church suggests certain means of reproduction be outlawed, it urges humanity to remember that “every child which comes into the world must in any case be accepted as a living gift of the divine Goodness and must be brought up with love.”⁶⁹

The Church has primarily recommended two types of laws regarding NRTs. These laws correspond to the Church’s suggested list of threats posed to human life by NRTs: threats to the dignity of the human person, and threats to the institution of marriage. The following Section will examine the Church’s legislative agenda in the context of NRTs. This Section will describe the Church’s recommendations, and compare those recommendations with currently enacted or proposed legislation. Fundamental presumptions which may explain the differences between the Church’s and states’ views will be identified, as well as some concerns about NRTs shared by both Catholic and non-Catholic sources. In conclusion, this Section will explore some proposed practical explanations for suspicion of and opposition to the Church’s role in the public and legal conversation about NRTs.

1. *Ban on Destructive Experimentation*

The Church proposes allowing procedures on embryos that respect their life, such as those procedures that are directed to their healing and improvement and proceed without disproportionate risks. However, the Church proposes legally forbidding treatments having disproportionate risks, or actions which treat embryos (or any stage of human life, for that matter) as objects of experimentation. The Church also supports a law forbidding the direct killing of human life at any stage, from conception to natural death.⁷⁰

67. *Id.* at 35-38.

68. ANDREWS, *supra* note 43, at 221; Weldon E. Havens & James J. Dalessio, *The Ever Widening Gap Between the Science of Artificial Reproductive Technology and the Laws Which Govern that Technology*, 48 DEPAUL L. REV. 825, 829 (1999).

69. DONUM VITAE, *supra* note 2, at 31.

70. *Id.* at 35-38; EVANGELIUM VITAE, *supra* note 9, at 113-15.

Effectively, these proposals call for banning all procedures which fertilize an embryo outside of the human body, for embryos exposed to conditions other than their natural environments are handled "experimentally," in so far as there are many risks to the continuing life of the embryo inherent in the procedures themselves.⁷¹ The Church proposes banning the cryopreservation of embryos, donation of embryos for research (even if directed to the treatment of disease), direct destruction of "spare" embryos, and the selective reduction of developing fetuses in a multiple pregnancy.⁷²

The law on these matters is currently in flux, but it may be concluded that its general state is counter to the Church's position. Federal funding is forbidden for procedures involving the destruction of embryonic, fetal, or even more developed unborn human life, whether via experimentation, fertility clinic decisions, or the selective reduction of a multiple pregnancy, (with the exception of funding abortions for patients with Medicaid insurance in limited circumstances).⁷³ However, all of these procedures are legally permissible, largely due to the Supreme Court's abortion decisions.⁷⁴ Furthermore, regarding the federal statute banning the use of federal funds for "research in which embryos are harmed or destroyed,"⁷⁵ President Bush has interpreted this statute as allowing the federal funding of research on certain "lines" of human pluripotent stem cells derived from embryos destroyed with private funds before the President's public announcement on August 9, 2001.⁷⁶ Cryopreservation of human embryos, donation of embryos for research, and the ordinary practices of NRTs, such as in vitro fertilization and intra cytoplasmic sperm injection, which may result in the loss of the embryos, are generally permitted in the private sector. However, nine states forbid nontherapeutic research on extra-uterine human embryos,⁷⁷ with Louisiana requiring that

71. Neri Laufer et al., *In Vitro Fertilization*, in *INFERTILITY*, *supra* note 47, at 723-25.

72. *EVANGELIUM VITAE*, *supra* note 9, at 113-15.

73. 42 U.S.C. § 289g(b) (2001).

74. *E.g.*, *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 803 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

75. 42 U.S.C. § 289g(b).

76. George W. Bush, *Remarks by the President on Stem Cell Research*, (Aug. 9, 2001), available at <http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html>.

77. LA. REV. STAT. ANN. §§ 9:123, 129 (West 2002); ME. REV. STAT. ANN. tit. 22, § 1593 (West 1992) (banning experimentation on any "live human fetus" intra or extra uterine); MASS. GEN. LAWS ch. 112, § 12J(a) I-IV (1996) (defining "fetus" to include an embryo; forbids research or experimentation on fetus in or out of mother's

any embryo manipulation be undertaken for the purpose of bringing about the development of a new human life.⁷⁸

There have been proposals for either reforming current laws or adopting voluntary practice standards that would serve to bridge a bit of the distance toward the Church's positions on the NRTs, but with important differences. One proposal from the American Society of Reproductive Medicine would limit the number of embryos that may be implanted within a single attempt to bring about a pregnancy, thus lowering the possibility of selective reduction: "Although multifetal pregnancy reduction is possible to reduce fetal number, its use does not completely eliminate associated risks of multiple pregnancy and may result in the loss of all fetuses and have adverse psychological consequences for patients."⁷⁹ Another proposal is the requirement of obtaining advanced informed consent from patients so that fertility clinics do not dispose of embryos in manners that would be objected to by the sources of sperm and eggs.⁸⁰ A 1999 Center for Disease Control survey discovered that in sometimes high percentages of patients, clinics handling embryos did not obtain consent for the manner of disposing patients' embryos, including donating the embryos to research.⁸¹

womb); MICH. COMP. LAWS § 333.2685(1) (2001) (prohibiting use of the human embryo for nontherapeutic research); MINN. STAT. § 145.422 (1998) (forbidding research or experimentation except to protect the life of the "conceptus," defined to include embryos); N.D. CENT. CODE § 14-02.2 (1997) (banning all research or experimentation on human fetuses including embryos); 18 PA. CONS. STAT. § 3216(a) (2000) (protecting from fertilization "unborn child" from any nontherapeutic medical procedure); R.I. GEN. LAWS § 11-54-1(a) (2000) (banning any research or experimentation, on embryos as well as fetuses); S.D. CODIFIED LAWS §§ 34-14-16, 34-1-1 (Michie 2001) (making it a crime to conduct nontherapeutic research with substantial risk of harm to that destroys a human embryo; also bans use of cells or tissue that a person knows were obtained as a result of harm to embryos).

78. LA. REV. STAT. ANN. §§ 9:123, 129 (recognizing human embryo outside the womb as "juridical person," and forbidding manipulation except for purposes of the "complete development of human in utero implantation.").

79. A PRACTICE COMM. REPORT OF THE AM. SOC'Y OF REPROD. MED., GUIDELINES ON NUMBER OF EMBRYOS TRANSFERRED (Nov. 1991); see also ANDREWS, *supra* note 43, at 57; SUSAN LEWIS COOPER & ELLEN SARASOHN GLAZER, BEYOND INFERTILITY: THE NEW PATHS TO PARENTHOOD 66 (1994) (reporting on the recommendations by the IVF America Program); C. Staessen et al., *Avoidance of triplet pregnancies by elective transfer of two good quality embryos*, 1993 HUM. REPROD. 1650, 1650-53.

80. Am. Soc'y for Reprod. Med., *Informed Consent and the Use of Gametes and Embryos for Research*, 68 FERTILITY & STERILITY, 780, 780-81 (1997).

81. CTRS. FOR DISEASE CONTROL AND PREVENTION, FINAL REPORT: SURVEY OF ASSISTED REPRODUCTIVE TECHNOLOGY: EMBRYO LABORATORY PROCEDURES AND PRACTICES, Report Summary, App. G, 14, CDC Contract 200-96-0511 (Jan. 29, 1999), available at <http://www.cdc.gov/nccdphp/drh/pdf/ARTsurvey.pdf>.

Save for those state laws forbidding embryo research, the proposals above suggest entirely voluntary actions to improve services to patients. These proposals would not stop the destruction of embryos as recommended by the Church. However, they forward the notion that embryos and fetuses merit some special handling, while continuing to allow embryos to be put at risk for the purpose of permitting artificial reproduction to go forward.

2. *Banning Techniques which Separate Procreation from the Marital Relationship*

The Church also recommends banning the use of donor gametes or embryos, surrogate motherhood, and post-mortem conception. It urges the state to forbid the destruction of rights inherent in the relationship between spouses, as these rights form the foundation for a civil society, such as the right of spouses to have children by one another in an ongoing marriage.⁸²

State laws currently do not ban the donation of gametes. They do not ban post-mortem conception. There are several ongoing legal challenges by parents of children conceived posthumously, to the Social Security Administration's refusal to award survivor benefits.⁸³ Otherwise, the matter of posthumous conception generally escapes public or legal attention.

State law on surrogacy is evolving. More states are currently against the practice than allow it. Some states ban surrogacy,⁸⁴ some draw a distinction between compensated and uncompensated surrogacy,⁸⁵ and a few states allow it.⁸⁶ Surrogacy has attracted a good deal of negative commentary, including criticisms from feminist perspectives.⁸⁷ Yet in the states where surrogacy is allowed, it is a steady business for those clinics specializing in it.

There have been relatively few proposals for further legislation in the areas of surrogacy, donor gametes, and post-mortem procreation. Two states currently ban the sale of a woman's egg or embryo.⁸⁸ Only New Hampshire places an age limit on the recipient

82. DONUM VITAE, *supra* note 2, at 35-38.

83. Denise Lavoie, *Kids from Frozen Sperm Denied Benefits*, COLUMBIAN, Sept. 2, 2001, at A11.

84. See, e.g., D.C. CODE ANN. § 16-401 to -402 (2001); MICH. COMP. LAWS §§ 722.851-.863 (2002); *In re Baby M.*, 537 A.2d 1227, 1241 (N.J. 1988).

85. See, e.g., KY. REV. STAT. ANN. § 199.590 (2)-199.990 (Michie 1995); LA. REV. STAT. ANN. § 9:2713 (West 1991).

86. See N.H. REV. STAT. ANN. § 168-B:16(I)(b) (2001); VA. CODE ANN. §§ 20-156-165 (Michie 2000).

87. See generally GENA COREA ET AL., *MAN-MADE WOMEN* (1987).

88. FLA. STAT. ANN. § 873.05 (West 2000); LA. REV. STAT. ANN. §§ 9:122, 9:130.

of a donor gamete or embryo.⁸⁹ It remains unclear whether laws banning sales of body parts in some states would be interpreted to forbid the sale of gametes or embryos. There have been proposals to limit the price a person may be paid for his or her gametes.⁹⁰ One state briefly considered a bill that would forbid potential parents from choosing a gamete donor based upon a physical or psychological profile. That same bill proposed that donors should be limited in the number of donations they can make and in the amount they may be paid.⁹¹ Such proposals recognize the same concerns held by the Church on NRTs, yet they do not seek to ban the procedures themselves.

Before considering the reasons for the differences between the Church's proposals and extant regulation, it is important to note that the Church has not specifically addressed the question of whether such technologies are protected under the United States Constitution, as this is not the type of question that the Church tends to take up in its "universal" documents. However, it is possible to deduce some of the subject matter the Church would interpose when considering such a constitutional question. The question might be phrased as follows: "Does a Constitution that has been interpreted to contain a right of privacy broad enough to encompass contraception and abortion, and rights to marry and rear a family, include the right to choose to procreate and parent by means of the NRTs?" In order clearly to consider the Church's reflections on this question, one must first prescind from many of the ongoing controversies in this area, such as whether cases affirming the right to avoid procreation may be interpreted to also affirm the positive right to procreate, and to do so using technological means.⁹²

It seems very likely the Church would first raise the issue of threats to human life posed by NRTs. This issue certainly figures prominently not only in the documents of the Holy See, but also in

89. N.H. REV. STAT. ANN. § 168-B:13.

90. The Ethics Comm. of the Am. Soc'y for Reprod. Med., *Financial Incentives in Recruitment of Oocyte Donors*, 74 FERTILITY & STERILITY 216, 216-20 (2000) [hereinafter *Financial Incentives*].

91. S.B. 1630, 1999 Leg., Reg. Sess. (Ca. 2000).

92. See generally Lori B. Andrews & Nanett Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 39-40 (2000); Lori B. Andrews, *Reproductive Technology Comes of Age*, 21 WHITTIER L. REV. 375, 376 (1999); Bruce Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 528-34 (1983); Ann MacLean Masie, *Restricting Surrogacy to Married Couples: A Constitutional Problem?*, 18 HASTINGS CONST. L. Q. 487, 505 (1991).

amicus briefs filed before the United States Supreme Court by the United States Catholic Conference of Bishops.⁹³ In exceptionally strong language, John Paul II said, “When a parliamentary or social majority decrees that it is legal, at least under certain conditions, to kill unborn human life, is it not really making a ‘tyrannical’ decision with regard to the weakest and most defenseless of human beings?”⁹⁴

The Church would also bring to bear on the constitutional question, the issue of possible threats to the well being of the least powerful parties in artificial reproductive transactions. This category might include the children conceived, especially those born deliberately with one legal parent, those whose married parents are not their biological parents, and those with siblings lost to selective reduction. Other persons whose well-being is at stake might include the donors of gametes or embryos, who might suffer from the processes used to obtain eggs and sperm. For men, this process regularly includes masturbating in a pornographic setting.⁹⁵ For women, this includes a weeks-long process involving hormone injections to cause hyperovulation, and surgery, sometimes under general anesthesia, to remove the eggs.⁹⁶ There are also the psychological ramifications for these parties; possible feelings of being “commodified” as a source of gametes, and the loss of relationship with their biological children.⁹⁷

The Church would also likely raise the possibility of threats to the institution of marriage and the family posed by NRTs, particularly the possible weakening of the marital bond by means of reproduction involving donor gametes, surrogates, or the availability of NRTs to single persons.

3. *The Sources of Differences*

The Church’s fundamental premise about the human person and human procreation can be distinguished from the premise often

93. See generally Brief of Amici Curiae of United States Catholic Conference, *Casey v. Planned Parenthood of S.E. Pa.*, 505 U.S. 833 (1992) (No. 91-744); Brief of Amici Curiae United States Catholic Conference, *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989) (No. 88-605).

94. *EVANGELIUM VITAE*, *supra* note 9, at 127.

95. *ANDREWS*, *supra* note 43, at 35.

96. Mark Damario & Zev Rosenwaks, *Ovum Donation*, in *INFERTILITY*, *supra* note 47, at 780-87.

97. PRACTICE COMM., AM. SOC’Y FOR REPROD. MED., *GUIDELINES ON REPETITIVE OOCYTE DONATION 2* (Nov. 2000), available at http://www.asrm.org/Media/Practice/oocyte_donation.pdf (“[O]ocyte donation may entail potential psychological risks, (ambivalence, regret, etc.).”).

found in writings by those who support or tolerate continued legal use of NRTs, or even argue for their constitutional protection. The reasoning underlying the latter position often begins by assigning substantial or even definitive legal weight to persons' desires for children in the face of infertility or some other obstacle to childbearing.⁹⁸ This position often interprets constitutional tradition regarding procreation and parenting as recognizing a large measure of individual authority by a person over his or her own body. This is often joined with an understanding of the constitutional right of privacy to include a right to make virtually all decisions relating to procreation. This, in turn, is due to an understanding of the act of procreative decision making as an inherently private matter.⁹⁹ The Supreme Court's opinions in the areas of contraception and abortion are regularly cited for these propositions, particularly the very expansive language found in the majority opinion in *Eisenstadt v. Baird*,¹⁰⁰ affirming the "right of the individual, married or single to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹⁰¹

A broad view of individual rights determining the shape of marriage and family also underlies the opinion that the state ought to refrain from intrusively regulating NRTs. Specifically, this view asserts a substantive due process right to make a wide range of choices about marriage, family life, and the rearing of children.¹⁰²

On the other hand, while the Church certainly recognizes human free will, it sees the human body always as "in relation" or "in solidarity" with others and with God. The Church also understands human freedom intrinsically to incorporate this relational aspect, and to include an orientation to truth and God.¹⁰³ The Church

98. See, e.g., U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES 222, OTA-BA-358 (1998) [hereinafter *MEDICAL AND SOCIAL CHOICES*]; John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 912, 915 (1996).

99. See JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 22-42 (1994); Marjorie Maguire Shultz, *Legislative Regulation of Surrogacy and Reproductive Technology*, 28 U.S.F. L. REV. 613, 616 (1994); Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 685 (1985).

100. 405 U.S. 438 (1972).

101. *Id.* at 453.

102. *MEDICAL AND SOCIAL CHOICES*, *supra* note 98, at 222; ROBERTSON, *supra* note 99, at 35-38; Lori B. Andrews, *Is there a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J.L. & TECH. 643, 664-65 (1998); Robertson, *supra* note 98, at 914.

103. EVANGELIUM VITAE, *supra* note 9, at 22.

teaches that true human freedom with respect to the body requires actions which respect the truth of the human person and human sexual intercourse. Even when looking at actions which appear to affect only a few persons—an intended mother and father, gamete donors, or a child—and which appear to be the product of “free choice,” the Church judges that authentic freedom may be violated and a wider swath of humanity harmed: “[M]an cannot find true happiness – towards which he aspires with all his being – other than in respect of the laws written by God in his very nature, laws which he must observe with intelligence and love.”¹⁰⁴ In the words of the Catholic Bishops of the United States: “[H]uman beings find fulfillment in pursuing what is authentically good for the human person as created by God. The pursuit of disordered desires masquerading as ‘interests’ easily leads to violence or greed, or self-indulgence or loneliness.”¹⁰⁵ Clearly, this view contrasts with a more individualistic notion of bodily freedom in the context of procreation.

On the nature of marriage and family relationships, the Church holds, as opposed to those who would support conceptions outside of marriage by means of NRTs, that there is a direct relationship between preserving civil society and what is often called the “traditional nuclear family.” This family is usually defined to include two married parents and their own biological children. The Church warns that if the civil law recognizes the violation of “a right inherent in the relationship between the spouses”¹⁰⁶—a right to have children only by each other—marriage itself could deteriorate, leading to the deterioration of civil society. The same is true if society violates children’s right to be born in circumstances equal to their dignity as human persons.

The Church’s view is in contrast with a position that would support, for example, collaborative reproduction or surrogacy, according to the notion that individual choice about matters of family life supports freedom and respects persons.¹⁰⁷ Under this view, these matters are inherently private.¹⁰⁸ This position also points to the fact that modern social life is replete with family forms that do not

104. HUMANAE VITAE, *supra* note 25, at 31.

105. COMM. FOR PRO-LIFE ACTIVITIES, THE NAT’L CONFERENCE OF CATHOLIC BISHOPS, FAITHFUL FOR LIFE: A MORAL REFLECTION 8 (1995).

106. DONUM VITAE, *supra* note 2, at 37.

107. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 300; Robertson, *supra* note 98, at 914.

108. Shultz, *supra* note 99, at 616.

correspond to the “traditional family.” This social “fact” should be recognized in law. To do otherwise is deemed—sometimes explicitly, sometimes implicitly—to dishonor or demean these non-traditional families.¹⁰⁹

E. Mutual Concerns

While acknowledging the differences between Church teachings, extant law, and legal and ethical proposals on NRTs, it should be noted that many of the deeper misgivings the Church has about NRTs have been articulated even by many who would support their continued legality. In addition to the above expressed concerns about marital discord, the well-being of the children conceived with such technologies, and the practice of terminating incipient human life as a seemingly regular and necessary part of the practice of the NRTs, the Church has three fundamental concerns about the effects of the NRTs. These include fears about the commodification of human persons and human material, the domination of technology and technological experts over humanity, and eugenics. The following Sections will articulate the Church’s concerns in these areas, note some agreement among observers outside of the Church, and conclude with proposed reasons for continued suspicion of the Church’s proposals and ways in which these gaps might be bridged by the Church.

1. Eugenics

The Church calls it “neonatal euthanasia” when embryos or fetuses are destroyed prior to birth in response to a genetic “diagnosis” either during pregnancy, or even prior to the embryo’s implantation.¹¹⁰ The Church fears that discoveries in genetics may be used as a pretext for ideologies which affirm ethnic or racial superiority. Speaking in *Evangelium Vitae* of prenatal diagnosis for purposes of considering abortion, Pope John Paul II opined: “This is eugenic abortion, justified in public opinion on the basis of a mentality – mistakenly held to be consistent with the demands of ‘therapeutic interventions’ – which accepts life only under certain conditions and rejects it when it is affected by any limitation, handicap or illness.”¹¹¹ Continuing, he noted that such practices “pre-

109. Barbara Kritchevsky, *The Unmarried Woman’s Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN’S L.J. 1, 5 (1981); Shultz, *supra* note 99, at 617.

110. DONUM VITAE, *supra* note 2, at 36.

111. EVANGELIUM VITAE, *supra* note 9, at 25-26.

sume to measure the value of a human life only within the parameters of 'normality' and physical well-being, thus opening the way to legitimizing infanticide and euthanasia as well."¹¹²

In practice, many would-be parents often tend to choose progenitors they perceive as "superior" donors for eggs and sperm. "If we enabled them to search for PhDs, that would be the only donors they would look at," notes the administrator of a Maryland surrogate parenthood and donor clinic about her clients.¹¹³ Another clinic director believes that parents want their children to be more beautiful, but they don't admit it: "They [the intended parents] say: 'We like her because she seems warmer.' But it's never the truth."¹¹⁴

Many observers share these concerns about the aggregate and long-term effects of such choices.¹¹⁵ Even among those who generally accept the legitimacy of such choices, there are predictions of possible future distinctions between the privileged who can "choose" their children and their traits, and those less privileged.¹¹⁶ Other commentators are concerned about the racial distinctions in the use and availability of NRTs, and even the future possibility of selection against homosexuals.¹¹⁷ Professor Twila Perry observes: "Because the standard of beauty in this country is a white one, in the world of reproductive technology, the genetic material of Blacks is essentially worthless."¹¹⁸

2. *The Authority of Technology*

Another concern expressed by the Church regards the control that individual researchers will have over citizens, in the absence of

112. *Id.* at 114.

113. Martha Frase-Blunt, *Ova-Compensating? Women Who Donate Eggs to Infertile Couples Earn a Reward But Pay a Price*, WASH. POST, Dec. 4, 2001, at F1, F6.

114. Sharon Krum, *American Beauty; Here is Lauren Bush, This Year's Model*, IN-DEP. LONDON, June 17, 2001, at 1, 2.

115. ANDREWS, *supra* note 43, at 135 ("The real tragedy of a eugenics plan is that it may in many cases overlook the very people who would be the best parents."); Madhu Kishwar, *The Continuing Deficit of Women In India and the Impact of Amniocentesis*, in COREA ET AL., *supra* note 87, at 34 ("Whatever other potential advantages sex determination tests may have, they are likely to be used in India as an incentive to destroy female foetuses [sic].").

116. LEE M. SILVER, REMAKING EDEN 3-8 (1998).

117. Aaron S. Greenberg & J. Michael Bailey, *Parental Selection of Children's Sexual Orientation*, 30 ARCHIVES SEXUAL BEHAV., 423, 423-25 (2001).

118. Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millennium*, 33 FAM. L.Q. 461, 472 (1999).

additional legislation and regulation.¹¹⁹ Pope John Paul II goes so far as to say:

[T]hrough these procedures [IVF and embryo destruction], with apparently contrary purposes, life and death are subjected to the decision of man, who thus sets himself up as the giver of life and death by decree. This dynamic of violence and domination may remain unnoticed by those very individuals who, in wishing to utilize this procedure, become subject to it themselves.¹²⁰

This type of procedure, he continues, “leads, whether one wants it or not, to man’s domination over the life and death of his fellow human beings and can lead to a system of radical eugenics.”¹²¹ A recent announcement by a biotechnology company that it had manufactured or cloned embryos in order to extract their stem cells for experimentation met with similar concerns from observers outside the Church.¹²² There is concern about the exercise of purely scientific authority on feminist grounds as well:

Whether ‘old’ or ‘new’, these procedures have in common that they represent an artificial invasion of the human body Increasingly, more and more control is taken away from an individual’s body and concentrated in the hands of ‘experts’ . . . who fiercely compete with one another on this ‘new frontier’ of scientific discovery and monetary profits.¹²³

3. *Commodification of the Human Person*

A final concern expressed by the Church is its fear that NRTs may lead to the commodification of the human person. This relates to the Church’s conclusion that those who perform and participate as patients in the NRTs usurp the proper place of God within the act of procreation. In the words of John Paul II: “When we lose sight of who we are in light of God” we are led to a:

[P]ractical materialism, which breeds individualism, utilitarianism and hedonism. . . . The values of being are replaced by those of having.

. . .

119. *DONUM VITAE*, *supra* note 2, at 35-38.

120. *Id.* at 21.

121. *Id.*

122. Diana K. Sugg, *Complex Challenges of Cloning*, *BALT. SUN*, Dec. 13, 2001, at 2A.

123. Renate Duelli Klein, *What’s ‘New’ About the ‘New’ Reproductive Technologies?*, in *COREA ET AL.*, *supra* note 87, at 65 .

Within this same cultural climate, the body is no longer perceived as a properly personal reality, a sign and place of relations with others, with God and with the world. . . . [S]exuality, too, is depersonalized and exploited [I]f [procreation] is welcomed, this is only because it expresses a desire, or indeed the intention, to have a child "at all costs", and not because it signifies the complete acceptance of the other and therefore an openness to the richness of life which the child represents.¹²⁴

Fears about commodifying human bodies, have led a number of observers to offer cautious words about proceeding with NRTs. The American Society of Reproductive Medicine cites the concern that "payment for oocytes implies that they are property or commodities and thus devalues human life."¹²⁵ At the same time, the Society believes this threat might be overcome by deeming the compensation to be, not for the eggs themselves, but for the inconvenience of the procedures to retrieve them.¹²⁶ Professor Margaret Radin suggests that not only commodification, but gender hierarchy concerns are raised in the special case of the surrogacy contract.¹²⁷ She suggests it would be helpful to ban surrogacy, but after noting various objections that might be raised on the grounds of unduly limiting "people's choices," suggests at least a ban on paid surrogacy.¹²⁸ Another writer, feminist scholar Andrea Dworkin, assesses the current situation in terms that are a good deal more stark: "'Women can sell reproductive capacities the same way old-time prostitutes sold sexual ones' While sexual prostitutes sell vagina, rectum and mouth, reproductive-prostitutes will sell other body parts: wombs; ovaries; eggs."¹²⁹

CONCLUSION—SUSPICIONS AND SUGGESTED BRIDGES

An even-handed review of the Catholic Church's teachings on NRTs must acknowledge the Church's sincere attempts to safeguard vulnerable participants and the dignity of the human person as an individual, a marital partner, and a procreator. However, the gulf between the Church's policy recommendations and existing law is vast. It is useful to point out that in addition to the fundamentally different starting points and frameworks of the Church

124. *EVANGELIUM VITAE*, *supra* note 9, at 40-42 (emphasis omitted).

125. *Financial Incentives*, *supra* note 90, at 217.

126. *Id.*

127. MARGARET RADIN, *CONTESTED COMMODITIES* 144 (1996).

128. *Id.*

129. Gena Corea, *The Reproductive Brothel*, in COREA ET AL., *supra* note 87, at 39 (citation omitted) (quoting ANDREA DWORKIN, *RIGHT-WING WOMEN* 182 (1983)).

and contrary observers, there are other possible reasons why the Church's voice has been less influential in this field than its serious—and often shared—arguments might merit. The brief list of reasons below is not intended to be an exhaustive one, but a practical list that takes into consideration the variety of subject matters that are at play within the subject of NRTs. It is also an invitation to look beyond stereotypes to the possibility of cooperation in such an important legal and social arena.

First, it is possible that the Church's arguments are more easily dismissed because of the perception that the Church opposes all things "artificial," and the belief that in light of modern technology, women's roles, and social choices, such a position should not be taken seriously. In response, the Church may wish to stress that it does not oppose all things "artificial" on a moral or a legal level. Rather, it is a question for the Church of the distinction between a technological intervention that seeks to realize a human good, versus one that destroys a human good. The Church's position on interventions to prevent conception must also be distinguished from those which cause the conception of a new life. Additionally, the Church no longer advocates laws banning artificial contraception, but, for the sake of the lives of third-parties, does advocate laws on the subject of abortion, embryo research, and NRTs. Finally, many might be persuaded, even if they do not see much social import in private decisions to avoid conception, that decisions about the processes for creating and destroying human life can significantly affect social life.

Second, some may fear that there is a relationship between a claimed anti-feminist strain in the Church's teachings and its position on a woman's choice to use an NRT. One should note that it is not only infertility, but also abortion, sexually transmitted disease (often themselves a result of non-marital sexual activity) and the decision to put off having children, that can lead to the use of NRTs. NRTs can circumvent the fertility problems that arise from these practices. Therefore, some may interpret the Church's opposition to NRTs as intimately tied to its opposition to abortion and non-marital sex, as well as the Holy Father's expressed preference for married women to avoid the workplace if they can and to rear their children full-time.¹³⁰

It is true the Church opposes many common practices that lead to the use of NRTs. This also may be said about many persons in

130. FAMILIARIS CONSORTIO, *supra* note 32, at 21-22.

society who are not Catholic. There are many popularly expressed concerns about the individual and social toll on men and women alike taken by abortion, sexually transmitted diseases and dramatically delayed childbearing. Furthermore, the Church's opposition to NRTs is not gender specific; it applies equally to men and to women. It is also based explicitly upon concerns for children—perhaps the most vulnerable parties in the matter—and for marital stability; these concerns go beyond sexual practices.

Third, there is also the possibility the Church's teaching is perceived to reflect too much its insistence on the complementarity of the sexes—the idea that men and women are differently gifted, but equal, and created to complement one another's gifts and natures. This idea partly underlies the Church's insistence upon conception within an ongoing marriage. Some reject the idea of complementarity, on the grounds that it can easily lead to women's subjugation to men, who are too easily perceived as being different in a "better" way.¹³¹ This concern might benefit from reflection on the continuing choice by a majority of persons of heterosexual marital arrangements, as well as the continued public attraction to the notion of the inherent differences in the sexes.¹³² In other words, complementarity is not solely a Catholic idea. Recent studies indicating that children in heterosexual, two-parent households seem to fare better than children in families with one parent, even when such studies control for economic factors, should also be considered.¹³³

Fourth, some may see the Church's position on NRTs through the prism of its requirement that sexual intercourse take place only within marriage. Many have definitively rejected this requirement.¹³⁴ Again, reflection on this point may be aided by considering that a significant percentage of Americans, though not a majority, continue to believe that unmarried couples should not engage in sexual intercourse.¹³⁵ Furthermore, the difficulties faced

131. Rosemary Radford Ruether, *Christian Understandings of Human Nature and Gender*, in RELIGION, FEMINISM, & THE FAMILY 96 (Anne Carr & Mary Stewart Van Leeuwen eds., 1996).

132. See, e.g., JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS (1992); DEBORAH TANNEN, GENDER AND DISCOURSE (1996).

133. Sara McLanahan, *The Consequences of Single Motherhood*, in SEX, PREFERENCE, AND FAMILY 306-18 (David M. Estlund & Martha C. Nussbaum eds., 1997).

134. Gallup Poll Analysis, *Majority Considers Sex Before Marriage Morally Okay*, May 24, 2001 (stating that fifty-three percent of Americans report that sex between "an unmarried man and woman" is "morally acceptable"; forty-two percent say it is morally wrong).

135. *Id.*

by persons having children outside of marriage are commonly understood. Finally, repeating a scenario that has occurred many times in the annals of family law, very little attention has been paid to the well-being of the children conceived in the “new situations” brought about by NRTs.

Fifth, and finally, some who reject the Church’s teachings on abortion may conclude that a large part of its teaching on NRTs is constituted by its teaching on abortion, reiterated and writ small. For a small percentage of persons who believe abortion ought to be legal under all circumstances, this difference is not likely to be bridged. However, most of the public is divided in a more nuanced way from the Church on the question of abortion, with a slight majority holding that abortion ought to be illegal entirely, or legal only in response to grave threats to the mother’s well-being.¹³⁶ Negative public reaction to the Fall 2001 announcement that a biotechnology company created human embryos solely for research gives a further indication of the level of respect for human life.¹³⁷ In sum, the degree of respect owed the human embryo is an ongoing question for much of the public, not solely a matter of the doctrine of the Catholic Church.

For some observers, the Catholic Church’s stance on NRTs is out of step with the times—the legal, the moral, and the social times. For others, the Church’s pronouncements are aspirational, idealistic, but simply impossible to follow “after the Fall.” Still, there is no mistaking the significant agreement in the United States, not only with the Church’s stance on respect for incipient human life, but also with the Church’s fears about the effects of NRTs on the adult participants as well as on the children produced. Perhaps it is our established constitutional and social predilection for understanding all matters concerning procreation to be “private.” Perhaps it is the centuries’-old resistance to state interference with “family” matters. Perhaps it is the result of an ingrained deference to the medical and technological professions. Or perhaps it is in large part because of the sheer strength of persons’ desires to have a baby. Whatever the explanation, the current laws and practices of concerning the NRTs are far indeed from the Catholic Church’s views. At present, it is difficult to imagine this will change. Still, legal and scientific experts, including many who support NRTs, are beginning to point the way to much needed reforms which echo

136. Carey Goldberg & Janet Elder, *Public Still Backs Abortion, But Wants Limits*, *Poll Says*, N.Y. TIMES, Jan. 16, 1998, at 6A.

137. Sugg, *supra*, note 122, at 2A.

somewhat concerns raised by the Church *ab initio*. At the same time, considering the implications for the very meaning of human life and the human family, if there are to be reforms, they are certainly taking their time in coming. One thing, however, is certain: the Church will continue publicly to reflect on matters which, it judges, go to the very nature of the human person, human families, and human freedom.